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# SUPREME COURT OF THE UNITED STATES

No. 278

OCTOBER TERM, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

## BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES

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## SUBJECT INDEX

ARGUMENT ..... 2

CONCLUSION ..... 5

## AUTHORITIES

McGill vs. United States, C.A.D.C. No. 14,792 decided August 20, 1959 ..... 2

Palermo vs. United States, 360 U.S. 343 ..... 2

Rosenberg vs. United States, 360 U.S. 367 ..... 4

## FEDERAL STATUTES

18 U.S.C. §3500 ..... 2-5

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The Brief of the United States in opposition to the Petition for Certiorari is basically founded upon two arguments:

1. That the original notes of the witness-agent do not constitute a statement as defined in 18 U.S.C. §3500(e).

2. That the substance of the original notes of the witness-agent was made available to the petitioner in the form of the case report.

With reference to the first argument, the United States first argues on page 10 and 11 of its brief that the notes are not a "report", or a "statement". However, on page 12, the United States seems to admit, in footnote 6, that the notes of an agent would be producible if such notes were the only record of an interview. The petitioner submits that the test under 18 U.S.C. §3500 (e) as to whether the notes constitute a "statement" would be the same regardless of whether such notes are the only record or not. 18 U.S.C. §3500(e) requires only a written statement made by the witness and signed or otherwise adopted or approved by him. The notes in the instant case were written by the witness himself and certainly adopted and approved by him when he used such notes to refresh his recollection before testifying. The petitioner submits that the statutory definition of a "statement" is fully met by the notes of the witness-agent.

The United States cites **McGill vs. United States, C.A.D.C. No. 14,792,** decided August 20, 1959 as holding that a detective's notes which he had read to refresh his recollection prior to testifying were not a statement required to be produced under 18 U.S.C. §3500. The Court of Appeals cites as authority for such a holding **Palermo vs. United States, 306 U.S. 343. Palermo vs. United States, supra,** did not cover the situation where a government agent is the witness, but deals with a situation where the witness is the person who was iterviewed by a government agent and the defense is seeking the government's record of such witness' statement to the agent. **Palermo vs. United States, supra,** does not support the holding of the Court of Appeals for the District of Columbia. However, the decision of that Court of Appeals does fully illustrate the necessity of a definitive statement by this

Court as to the law governing the production of notes and memoranda of government agents when such agents take the witness stand.

With reference to the second argument of the United States, the major portion of its brief proceeds upon the unfounded and unwarranted assumption that the substance of the original notes of the agent was made available to the petitioner in the form of a case report. The original notes were never produced, were never examined by the trial Court and were never sealed or made in any way a part of the record in this case. There is no basis whatsoever in the record for the argument of the United States that the substance of the notes was contained in the case report.

The United States, on pages 10 and 11 of its brief, further indulges in the speculation, entirely unsupported by the record, that the notes *may* have recorded events in some unintelligible, abbreviated or symbolic fashion, and that the notes *may* require association with the subjective reasoning processes of the agent's mind before the notes can be interpreted. The need for speculation beyond the realm of the record would not be necessary had the District Court followed the requirement of 18 U.S.C. §3500. For then, the production of the notes would have been required for inspection by the trial judge and, if the trial judge decided that the notes should not be turned over to the petitioner, the notes would have been sealed and made a part of the record and now would be available for inspection by this Court. The fact that the Government must now indulge in surmise and conjecture as to what the notes *may* have contained clearly illustrates the prejudicial effect of the failure of the trial judge to follow the requirements of 18 U.S.C. §3500.

The United States continues its guessing game with the statement, on page 12 of its brief, that the case report (not a part of the record in this case) contains evidence that it was prepared from the agent's notes and encompassed the substance of the notes. It is the purpose of 18 U.S.C. §3500 to remove the decision as to the usefulness of the documents from the control of the prosecution and place such decision in the hands of the trial court, subject to adequate protection of the rights of a defendant by way of review. It is not for the prosecution to decide that the case report encompassed the substance of the original notes. That decision, under the **Jencks** case, is for the defendant; that decision, under 18 U.S.C. §3500, is for the trial court with adequate means for reviewing such decision on appeal.

The United States contends, on pages 13 and 14 of its brief, that the situation in the present case is parallel to that in **Rosenberg vs. U. S., 360 U.S. 367,** wherein the court held that, although a letter signed by a witness should have been turned over to the defendant, the failure to do so was not prejudicial error since the defense had obtained the same information by other means. The petitioner submits that there is a vital difference in the two cases. In **Rosenberg vs. U. S., supra,** the letter in question was produced to the trial judge, withheld from the defendant after examination by the trial judge, was then preserved in the record, and was reviewed by the appellate court. In the present case, the notes in question were not produced, were not inspected by the trial judge and were not preserved in the record to permit review of the trial judge's ruling. The prejudicial effect of the trial court's action is obvious.

The United States concludes its argument with again assuming that the case report contained the same information as the notes of the agent. Such assumption is unfounded and unwarranted and the fact that the Government must resort to assumption illuminates the error made by the trial judge in not making an inspection of the notes and at least causing them to be reserved in the record so as to permit review of the correctness of his ruling.

## CONCLUSION

An unfounded assumption by the government that the case report contained the same information as the agent's notes can never be considered a worthwhile substitute for the rights of a defendant under the Sixth Amendment to the Constitution. Nor can such assumption ever take the place of the procedures specified by 18 U.S.C. §3500. The petitioner respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner in Reply to Brief for the United States was mailed to the Solicitor General, Department of Justice, Washington 25, D. C. this 22nd day of September, 1959 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

I FURTHER CERTIFY that a copy of the foregoing Brief of Petitioner in Reply to Brief for the United States was mailed to the office of James L. Guilmartin, United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this 22nd day of September, 1959.

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